

IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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REGULATORY AUTH.

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IN RE: PETITION OF BELL SOUTH TO)
IMPLEMENT NEW AND INCREASE) DOCKET NO. 00-00041
EXISTING LATE PAYMENT CHARGES)

OFFICE OF THE
EXECUTIVE SECRETARY

TENNESSEE CONSUMERS' BRIEF IN OPPOSITION TO BELL SOUTH'S MOTIONS
TO STRIKE, FOR SUMMARY JUDGMENT TO BELL SOUTH'S ALTERNATIVE
REQUESTS, TO BELL SOUTH'S REQUEST TO DENY ARGUMENT AND
BELL SOUTH'S OTHER OBJECTIONS

Tennessee consumers, without waiver of their position regarding Tenn. Code Ann. § 4-5-317; Tenn. Code Ann. § 65-2-118; and Tenn. Code Ann. § 65-2-119 disposition, file this brief in opposition to BellSouth's Motion to Strike, for Summary Judgment and to BellSouth's Alternative Requests and to BellSouth's Request to Deny Argument, and believe the arguments here are sufficient to address other BellSouth motions and objections, including but not limited to its objections to modification of the Protective Order.

Counsel for the Consumer Advocate Division is currently serving on jury duty in the Circuit Court for Davidson County. Counsel for the Consumer Advocate Division regrets any editorial difficulty that may have resulted from counsel's compressed schedule for drafting this document.

A Brief History of the Proceedings

BellSouth, the initiator of this cascade of legal events which have resulted in this irregular procedural posture, protests Tennessee consumers' refusal to succumb to its machinations. A fair recounting of the procedural history shows that the root cause of the problem was the

company's refusal to answer discovery which included the nature of its proposed tariff or to even define the nature of its tariff at this late date.

R. Terry Buckner filed an affidavit at the beginning of this proceeding and a subsequent affidavit in response to BellSouth's Motion for Summary Judgment. As Mr. Buckner states in his affidavits, the average basic local exchange telephone services rates in effect on June 6, 1995 took into consideration delays in compensating BellSouth for the provision of BellSouth's basic local exchange telephone services. He contends that as a result, Tennessee consumers basic local exchange telephone services rates will be increased and basic local exchange telephone services consumers will be billed twice. BellSouth does not dispute any of Mr. Buckner's assertions. As a result, it is not proper to grant a judgment in favor of BellSouth. Moreover, if BellSouth disagrees with Mr. Buckner's statements of facts, or there is doubt, judgment in favor of BellSouth is not appropriate. This brief incorporates Mr. Buckner's affidavits by reference.

BellSouth operates under price regulation as defined by Tenn. Code Ann. § 65-5-209. In order to secure the benefits of this status the company is required to conform to certain requirements. First, its initial rates must be certified by the agency as just, reasonable and affordable on the effective date of price regulation.¹

Res Judicata and Estoppel Should Prevent the TRA and BellSouth from Alleging That the Average Rates for Basic Local Exchange Telephone Services on June 6, 1995 Which Include Provisions and Charges for the Consequences for Late Payment of Basic Local Exchange Telephone Services Is Unjust.

Res judicata and estoppel should prevent the TRA and BellSouth from alleging that the average rates which currently include provision for the consequences for late payment of basic

¹Tenn. Code Ann. § 65-5-209 (a).

local exchange telephone services is unjust. Res judicata and estoppel are both doctrines which prevent the re-litigation of matters which were expressly or implicitly litigated.

Tenn. Code Ann. § 65-5-209 (a) provides that:

(a) Rates for telecommunications services *are just and reasonable when they are determined to be affordable* as set forth in this section. Using the procedures established in this section, *the authority shall ensure that rates for all basic local exchange telephone services and non-basic services are affordable on the effective date of price regulation* for each incumbent local exchange telephone company.

(b) An incumbent local exchange telephone company shall, upon approval of its application under subsection (c), be empowered to, and *shall charge and collect only such rates that are less than or equal to the maximum permitted by this section* and subject to the safeguards in § 65-5-208(c) and (d) and the non-discrimination provisions of this title.

(Emphasis Supplied).

As a matter of law discriminatory rates are unjust. See, Tenn. Code Ann. § 65-4-122. In this case, the justness and reasonableness of basic local exchange telephone services rates as they existed on June 6, 1995 has been litigated and those rates have been found to be just and reasonable. This agency and BellSouth have certified as matter of law and fact that BellSouth's rates on June 6, 1995 were just and reasonable and both the TRA and BellSouth are bound by that certification. This certification of justness and reasonableness particularly applies to rates for basic local exchange telephone services rates because BellSouth is expressly prohibited from increasing basic local exchange telephone services rates for four years from the initiation of a price regulation plan. Tenn. Code Ann. § 65-5-209 (f).

AT&T raised the issue of justness and reasonableness in the first appeal of the price regulation case and Tennessee consumers specifically raised the issues of the justness and

reasonableness of rates at both the agency and appellate levels in the second appeal. The Tennessee Court of Appeals upheld this certification in *BellSouth v. Greer*, 972 S.W.2d _____ and as a result the justness and reasonableness of basic local exchange telephone services rates in existence on June 6, 1995 are *res judicata* as to the Tennessee Regulatory Authority, BellSouth and Tennessee consumers.

Accordingly, BellSouth is estopped from asserting that basic local exchange telephone services rates which have remained unchanged since the beginning of price regulation² are unjust and unreasonable whether indirectly through, stealth or directly.³

A. BellSouth's Actions Initiated and Caused the Procedural Problems in this Proceeding.

This is BellSouth's second proceeding to initiate a late payment charge since it began price regulation. The proceeding arose a few months after the company withdrew its first attempt to institute a similar charge because it did not want to respond to Tennessee consumers' discovery request. The two proceedings differ only as to the percentage of the charge (5% in the former proceeding as opposed to 3% in this proceeding) and in this proceeding BellSouth proposes to allocate the proceeds to reduce the nonbasic service of "hunting charges."⁴

More than once, counsel for BellSouth have specifically alleged that its late charge tariff

²December 1, 1998.

³It should be noted that BellSouth concedes that basic local exchange telephone services rates are just and reasonable in its answer. BellSouth answer at p. 5.

⁴The company suggests in argument that it is reducing the hunting charges due to competition. Hunting refers to the service which switches a call to another telephone number if the number dialed is busy. If the company's allegation is factually true, there should be a determination whether competition will regulate the price and the service should be exempt from regulation. Tenn. Code Ann. § 65-5-208 (c). If hunting is exempt the company must reduce another rate to meet Tenn. Code Ann. § 65-5-209 adjustments. At this juncture, the agency has stalled discovery of necessary facts in this regard.

"is not a service." On page 7 of the company's answer, BellSouth expressly states:

The proposed late payment charge *is not a payment for any telecommunications service...* (Emphasis supplied).

Contrary to BellSouth's express assertion, however, the majority of the directors of this agency found that BellSouth's late payment tariff is a nonbasic service, without any substantial or material evidence which supported the agency decision. It should therefore be no surprise to BellSouth or anyone else that Tennessee consumers sought reconsideration and rehearing of the agency decision.

Furthermore, Tennessee consumers on March 22, 2000 sought to clear up BellSouth's allegation in its answer. Tennessee consumers submitted the following discovery request to determine the nature of the late payment tariff:

Item No. 25:

Please state each and every fact which supports BellSouth's statement that the proposed charges for late payments are not payments associated with the provision of telecommunications service?

BellSouth's answer to this discovery request was:

BellSouth objects to this Request on the grounds that it is irrelevant and that the information sought does not appear reasonably calculated to lead to the discovery of admissible evidence. BellSouth also objects to this Request on the grounds that it is vague and overly broad and that responding to it would be unduly burdensome. BellSouth does not know to what purported "statement" of BellSouth the Request refers. Without waiving this objection, please see BellSouth's answer to the CAD's complaint.

To this day BellSouth has never answered Tennessee consumers' discovery request. To this day BellSouth has not stated the nature of the tariff.

The reason BellSouth has not articulated the nature of the tariff is apparent from both R. Terry Buckner's Affidavit and the legal authorities BellSouth submits to support its late payment charge⁵— the charge is intended to be an integral part of all tariffs for services and the rates for the services. As a result the Hearing Officer correctly found that integrating this new charge would defeat the intent of Tenn. Code Ann. § 65-5-209 (f) and would therefore be unlawful with respect to basic local exchange telephone services.⁶

When BellSouth failed to answer discovery request 25 and others, Tennessee consumers filed a Motion to Compel. BellSouth also filed a Motion to Compel. Instead of ruling on the Motions to Compel, the Hearing Officer sought to resolve issues without the completion of discovery. Tennessee consumers objected to the Hearing Officer's position on the ground that discovery was not complete and that Tennessee consumers would be prejudiced. The agency directed the Hearing Officer to consider Tennessee consumers objections and enter an Initial Order.

The Hearing Officer held a hearing to consider Tennessee consumers' objections. Tennessee consumers again argued that discovery was incomplete and that the case was not postured to allow the decision contemplated by the Hearing Officer. BellSouth argued that the

⁵The late payment charge is an integral part of the rates and services in every case submitted by BellSouth. Moreover, none of the utilities are subject to the legal constraints of BellSouth.

⁶BellSouth private line tariff presents a different scenario. Although the private line tariff is an basic local exchange telephone service, if its late payment charge was placed into effect before June 6, 1995, the late payment charge is just and reasonable as a matter of law. Tennessee consumers will therefore only assert that state and federal law permit private line consumers to assert certain defenses and that BellSouth has no right independent of the private line consumers agreement with other service providers to initiate a late payment charge when the late payment charge arises from a purchase of accounts. In addition, neither the private line consumer nor any other consumer delegates authority or capacity for any telecommunications service provider to make the consumer subject to a third party, by BellSouth's mere purchase of accounts. Tennessee consumers will also defend Tennessee consumers by showing that a purchase of accounts is lawful, but the purchase of accounts procedure of BellSouth and others is unlawful in that it does not comport with state and federal law.

Hearing Officer should make such a decision. The Hearing Officer subsequently entered a written order holding that the late payment charge was a telecommunications service and that the tariff violated Tenn. Code Ann. § 65-5-209 (f). Tennessee consumers and BellSouth subsequently held a telephone conference with the Hearing Officer regarding the Initial Order. At the conference, BellSouth objected to the entire order, and Tennessee consumers objected to the finding that the late payment charge was a telecommunications service. The conference is memorialized by the July 5, 2000 letter from counsel for Tennessee consumers to Mr. Gary Hotvedt, the Hearing Officer.⁷ The Hearing Officer promised to take the Tennessee consumers position under advisement and to would rule on it.

In addition, the Hearing Officer held during the conference that he only ruled on the issues in the Initial Order because he believed the other issues warranted a fact hearing.⁸ The Hearing Officer did not memorialize the telephone conference, but did not deny this assertion at the hearing on the Initial Order.

The Hearing Officer subsequently amended the Initial Order by articulating the specific service he believed the tariff provided. The Hearing Officer found that:

The “late payment charge” as proposed in this tariff is a “telecommunications service” for which a charge is levied.

(1) The “telecommunications service” component of the tariff is BellSouth’s provision to the subscriber the benefit of paying the previous month’s bill (for the underlying telecommunications services) after the next billing date without fear of immediate disconnection, for which a charge of 3% of the unpaid balance is added to the subscriber’s bill.

⁷BellSouth’s objection included the finding of the particular telecommunications service. It made a similar objection in its arguments before the agency regarding the Hearing Officer’s decision.

⁸Presumably, the Hearing Officer was going to permit discovery regarding the remaining matters.

If this tariff is approved as filed, one cannot subscribe to any telephone service without being subject to it, whether one utilizes this service or not. On June 6, 1995 and when it became subject to price regulation, BellSouth provided this service/benefit to subscribers without adding 3% to the subscriber's bill.

(2) The "charge" component of the tariff is the 3% of the unpaid balance, once it is added to the bill.

The late payment charge in this tariff becomes a rate increase at the time the 3% charge is added to the bill, because once added, the rate of the underlying telecommunication service increases by 3%. Therefore, if the late payment charge in this tariff were to be applied to "basic local exchange telephone services", it would constitute an impermissible rate increase by violating the 4-year freeze in the price regulation statute.

Therefore, the Hearing Officer identified a specific service and found that BellSouth's tariff was unlawful and violated Tenn. Code Ann. § 65-5-209 (f) because it increased rates for basic local exchange telephone services. In addition, an increased *collection* of rates associated with basic local exchange telephone services also violates Tenn. Code Ann. § 65-5-209 (b).

BellSouth orally objected to the amended Initial Order and presented arguments. The company did not provide any written objections. Tennessee consumers decided not to object to the Hearing Officer's findings *regarding the particular service found by the Hearing Officer*⁹ or the finding that the tariff unlawfully increased basic local exchange telephone services rates, but would have preferred that the Hearing Officer's Order be grounded in the specific statutory section of Tenn. Code Ann. § 65-5-208 (a) (1).

As Mr. Buckner's affidavit states, basic local exchange telephone services rates include their own recurring and non-recurring charges¹⁰ and nonbasic service rates include their own

⁹Obviously, Tennessee consumers do not waive any right to object to any other finding of service when they did not object to the particular service found by the Hearing Officer.

¹⁰Tenn. Code Ann. § 65-5-208 (a) (1).

recurring and non-recurring charges.¹¹ The charges are not mixed, in a way that basic local exchange telephone services incur nonbasic recurring and non recurring charges, and nonbasic services incur basic local exchange telephone services recurring and non recurring charges. The nonbasic service approved by the TRA, however, would unlawfully mix the charges in contravention of Tenn. Code Ann. § 65-5-209 (b) and Tenn. Code Ann. § 65-5-209 (f).

This factual dispute pertains to whether BellSouth's tariff is a "late charge" made as consideration for an extension of time for payment or to compensate the company for damages it suffers for a failure to pay bills on time. *Wilson v. Dealy*, 222 Tenn. 196, 199-201, 434 S.W.2d 835, 836-837 (1968). The record shows that BellSouth has taken both positions. As Mr. Buckner's second affidavit stated, the service as articulated by the hearing officer, could permit a consumer to delay payment of a bill indefinitely by merely paying the charge and that further inquiry is necessary. (In fact, Tennessee consumers have subsequently discovered that a Tennessee court appears to have expressly rejected the Hearing Officer's premise of the type of service a late payment such as BellSouth's provides in *Wilson v. Dealy*.)

By a 2-1 vote, an agency majority not only orally reversed the Hearing Officer's order without citing specific lawful grounds, but also decided the entire case in favor of BellSouth without an evidentiary hearing on the remaining issues. The dissenting voter argued that the case was not properly postured for the decision made by the majority, but took no position as to what his vote would be if the case were properly postured. Separate Orders were entered by the majority and the dissent.

After being unable to determine whether BellSouth was placing the tariff into effect prior

¹¹Tenn. Code Ann. § 65-5-208 (a) (2).

to the entry of the written order, Tennessee consumers filed a Petition for Stay. No hearing was held on the Petition.

Written decisions were subsequently filed by the majority and the dissent. The written decision of the majority was entered on August 3, 2000 and relied upon the Hearing Officer's decision prior to amendment and Tennessee consumers filed a Second Petition for Stay and Reconsideration. As grounds for reconsideration, Tennessee consumers argued that the majority made material errors of fact and law.¹²

With respect to the Second Petition for Stay, BellSouth confirmed that some Tennessee consumers's may be irreparably harmed because the late charge itself could result in termination of basic local exchange telephone services and an inability to restore service. Upon termination of service, some consumers would retain telephone access to E911 Emergency Services or Operator Assistance but other consumers would not retain telephone access to the services. In addition, BellSouth never alleged that it would be harmed by a stay. By voice vote, the agency heard argument but decided to rule on the Petition for Stay at a later date.

Again by voice vote the agency granted Tennessee consumers Petition for Reconsideration, but the grant was unusual. The agency granted the Petition for Reconsideration with consideration of the merits at a later date. Counsel for Tennessee consumers requested the agency to clarify its oral decision but was rebuffed. Counsel made the request for clarification because Tenn. Code Ann. § 65-2-118 states that if the agency *enters no written order within a specific time the petition is deemed denied*. Therefore the agency's decision conflicts with the statutes. Since the grant of the Petition for Reconsideration required the entry of a written Order

¹²See, Tenn. Code Ann. § 65-2-108; Tenn. Code Ann. § 65-2-109; Tenn. Code Ann. § 65-2-116.

within 20¹³ or 30 days¹⁴ and no written order was entered in either period, the consequence is, arguably, that the Petition is deemed denied.

Executive Secretary's Notice.

The Executive Secretary of the agency subsequently sent the parties a notice suggesting agency action in other than a public meeting to require the parties to make certain filings. Tennessee consumers objected on unlawful public meeting grounds and again objected that the agency was proceeding unlawfully.

The request of the Executive Secretary again indicated that the agency's procedure was unlawful. *Tenn. Code Ann. § 65-2-119 requires the agency to follow the procedures of the chancery courts* with reference to the disposition of rehearings in such courts. *Tenn. Code Ann. § 4-5-317* required the agency to issue an order. Counsel for Tennessee consumers filed an objection to the unlawful procedure.¹⁵

BellSouth escalated the filing requested by the Executive to a Motion for Summary Judgment and submitted findings of fact and conclusions of law.

Tennessee consumers submitted the affidavit of R. Terry Buckner in opposition to BellSouth's Motion and proposed findings of fact and conclusions of law.¹⁶ In addition, counsel for Tennessee consumers advised the agency that he had to be out of town for a few days but

¹³Tenn. Code Ann. § 4-5-317.

¹⁴Tenn. Code Ann. § 65-2-118.

¹⁵Counsel has a duty of zealous advocacy.

¹⁶Tennessee consumers submit that when any Motion for Summary Judgment is submitted with any facts they have an absolute, due process right to submit opposing affidavits.

would file a brief upon his return.¹⁷

Jury Duty

Upon his return, counsel was required to report for jury duty on September 18, 2000 after a legal summons for his attendance. Upon reporting, counsel was selected to serve as a juror in a trial. At the time counsel had no notice of the agency's proposed agenda. Instead of the three days proposed by the summons, however, the jury trial is expected to last into the week of September 25, 2000.

BellSouth Further Escalated the Proceeding by Filing Motions to Strike Mr. Buckner's Affidavit or for Alternative Findings Regarding the Affidavit.

In addition to escalating the filing noticed by the Executive Secretary to a Summary Judgment Motion, on September 19, 2000, BellSouth filed a legal document which in part moved to strike the Affidavit of Mr. Buckner and to strike any Tennessee consumers response to the company's motion for summary judgment.¹⁸ Tennessee consumers respectfully submit that they have a due process right to respond to BellSouth's Motions to Strike. Alternatively, BellSouth moved the agency to rule that the Affidavit of Mr. Buckner does not present any issues of material fact. In addition, the company moved the agency to approve its tariff upon reconsideration.¹⁹

Since counsel for Tennessee consumers was serving as a juror in trial, he requested Assistant Attorney General Vance Broemel to file a Motion for Continuance. In addition, in that Motion, Mr. Broemel advised BellSouth that counsel would respond to BellSouth's filings.

¹⁷Counsel was out-of-state to place his mother in a nursing home.

¹⁸BellSouth's "Response" page 3, paragraphs 3-5.

¹⁹BellSouth's "Response" page 3, paragraph 6.

BellSouth, apparently chagrined that an advocate would want to respond to its motions, filed an opposition to the Motion for Extension of Time and a Motion to prohibit Tennessee consumers from responding to the company's Motions.

BellSouth's Motion to Strike the Second Affidavit of R. Terry Buckner Should Be Overruled Because Due Process Would be Denied Tennessee Consumers.

BellSouth's motion to strike the affidavit of Mr. Buckner should be overruled. Tennessee consumers' are the non-moving party in this proceeding and Mr. Buckner's affidavits conforms to Rule 56.06 of the Tennessee Rules of Civil Procedure and Tenn. Code Ann. § 4-5-313 (6). In particular Tenn. Code Ann. § 4-5-313 (6) provides in pertinent part:

Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material noticed, of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the facts or material so noticed.

Tennessee consumers were clearly and unequivocally within their rights to contest and rebut the facts asserted by BellSouth. As this statute shows, Tennessee consumers must be afforded an opportunity to contest and rebut any facts or material noticed by the agency. In this case, the Executive Secretary filed a notice which stated that the agency intended to rely upon specific facts submitted by BellSouth. Such a notice triggers Tennessee consumers' right to be afforded an opportunity to rebut or contest the facts or material noticed by the agency.

In addition, Tenn. Code Ann. § 4-5-312 (b) provides in pertinent part:

(b) To the extent necessary for full disclosure of all relevant facts and issues, the administrative judge or hearing officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence...

The Affidavit of Mr. Buckner is consistent with 312 (b) and BellSouth's Motion to Strike or rule

that the affidavit does not present any material facts should be overruled. Furthermore, Mr. Buckner's affidavit clearly and unequivocally presents substantial and material facts.

Experts Can Testify to Facts, Draw Inferences from Facts and Testify to the Ultimate Issue.

The affidavits, along with all "other evidence" in the record²⁰, must be viewed in the light most favorable to the non-moving party, *and all reasonable inferences to be drawn from such evidence must be construed in favor of the non-moving party*. *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). If, after such consideration, a genuine issue of fact remains for trial, *or if there is doubt* as to whether or not genuine issues remains for trial, the summary judgment motion must be overruled.²¹ There is no "evidence" in the record other than the affidavits of Mr. Buckner. Mr. Buckner's factual evidence also presents, in some instances the reasonable inferences which may be drawn. The only evidence as to the workings of BellSouth's tariff is presented by Mr. Buckner.

Mr. Buckner's affidavit and testimony predicated on that affidavit are admissible under Tenn. Code Ann. § 4-5-313. This statute provides in pertinent part:

Rules of evidence - Affidavits - Official notice.

In contested cases:

(1) The agency shall admit and give probative effect to evidence admissible in a court, and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs....

Mr. Buckner is an expert and his testimony would be admissible in any Court. Furthermore, his

²⁰It is important to note that affidavits are "evidence" while statements of counsel are neither facts nor evidence.

²¹*Evco v. Ross*, 528 S.W.2d 20, 24-25 (Tenn. 1975); Followed, *Buddy Lee Attractions v. Williams Morris Agency*, 13 S.W. 3d 343, 347 (Tn. Ct. App. 1999).

testimony is necessary to ascertain facts not reasonably susceptible to proof if the legal standard is not discussed. Moreover, Mr. Buckner's affidavit is of a type commonly relied upon by reasonable prudent men in the conduct of utility and regulatory affairs.

As Mr. Buckner's second affidavit shows he has a long history of experience in regulatory matters and is a Certified Public Accountant. As a CPA he has some formal legal training and as a matter of course interprets statutes, rules and regulations.²² He has testified in numerous proceedings before this agency and its predecessor. He has knowledge of the workings of tariffs and actual experience with private utilities such as BellSouth. As a result, Mr. Buckner qualifies as an expert.

As the rules of evidence show an expert can testify to many issues including the ultimate issues. Mr. Buckner is qualified to present testimony under Tennessee Rules of Evidence (TRE) 702 which provides:

Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Mr. Buckner is qualified to present testimony under TRE 703 which provides in pertinent part:

Rule 703. Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an *opinion or inference* may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

²²While a CPA's legal conclusions are not binding on a Court, such an expert may integrate legal language into his presentation in order to explain how facts are applicable to law.

Mr. Buckner is qualified to present testimony under TRE 704 which provides in pertinent part:

Rule 704. Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Mr. Buckner's testimony of facts is otherwise admissible and is therefore not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Finally, the rules of evidence under the UAPA and the TRA's procedural statutes are even more liberal than the Tennessee Rules of Evidence. Tenn. Code Ann. § 65-2-109 provides in pertinent part:

In all contested cases:

(1) The authority shall not be bound by the rules of evidence applicable in a court but it may admit and give probative effect to any evidence which possesses such probative value as would entitle it to be accepted by reasonably prudent persons in the conduct of their affairs; provided, that the authority shall give effect to the rules of privilege recognized by law; and provided further, that the authority may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence.

Therefore, the TRA's evidentiary rules are more liberal than a Court's. In addition, Mr.

Buckner's affidavit is clearly relevant and material to the issues in this proceeding. There is no reasonable basis to strike his affidavits. As a result, BellSouth's Motion to Strike and alternative motions regarding Mr. Buckner's affidavit should be overruled.

Due Process Is Denied When Discovery Is Not Complete and a Protective Order Prevents Tennessee Consumers from Utilizing Relevant and Material Documents.

Tennessee consumers sought to inspect and copy BellSouth's contracts regarding its purchases of accounts. BellSouth permitted inspection but did not permit Tennessee consumers

to copy the documents.²³ Since the Hearing Officer held discovery in abeyance and had reserved other matters such as those pertaining to BellSouth's purchases of accounts for a subsequent hearing the copying and the disclosure issues regarding the contracts were not addressed at the time the majority, *sua sponte*, decided the case in favor of BellSouth. As a result, Tennessee consumers have been denied due process protections.

In most cases, parties can seek modification of a Protective Order before a hearing at which the matters will be at issue. Even if modification of the Protective Order is denied, Tennessee consumers and the parties would be permitted to discuss the contents of any documents protected by the Order in a closed hearing. The TRA has neither permitted the Protective Order to be modified, nor permitted a closed hearing regarding confidential matters in this case.

After the majority's decision in its favor, BellSouth provided Tennessee consumers with the contracts but Tennessee consumers could not discuss the contracts due to the Protective Order. The blanket Protective Order was entered in this case on April 5, 2000. The Protective Order provides that:

All summaries, notes, extracts, compilations or other direct or indirect reproduction from or of any protected materials, shall be entitled to protection under this Order.

The Protective Order also requires the Order itself to be modified to remove the protection from documents through a particular procedure. Thus, even though the contracts are relevant and material, Tennessee consumers could not then, and cannot now reasonably introduce and discuss

²³Subsequent communications with BellSouth indicated that there was a misunderstanding as evidenced by an exchange of letters between the parties.

the contracts and use them offensively and defensively to BellSouth's assertions.

Tennessee consumers filed a motion to modify the order to permit use of the contracts. Tennessee consumers generally have no interest in the particular names of non-BellSouth contracting parties, but do require the nature of the contracting party, e.g. whether the contracting party is a billing aggregation or telecommunications service provider and the terms and conditions of the contracts. (However, some manner of linking those telecommunications service providers who have purported in tariffs this year to commit Tennessee consumers to pay unspecified late charges to BellSouth may also be necessary.)

BellSouth contests the modification of the Protective Order and the use of the terms and conditions of its contracts to refute its positions. In addition, BellSouth appears to have enlisted the contracting parties to submit statements contesting modification of the Protective Order. To Tennessee consumers' knowledge, none of the contracting parties, have sought a limited intervention pursuant to Tenn. Code Ann. § 4-5-310.

Since the contracts themselves are purported to arise from a nondiscriminatory tariff and Tennessee consumers generally do not need to name any party, there is no conceivable harm in modifying the Protective Order to permit disclosure of the nature of the non-BellSouth parties and the terms and conditions of the contracts. In addition, disclosure of the name of any telecommunications provider who modified or has sought to modify its tariff to grant BellSouth an independent right to charge an unspecified amount to Tennessee consumers should be disclosed.

No person objecting to disclosure has identified any specific term of the contracts the disclosure of which will result in peculiar harm to the company. As a result objections to

modification of the Protective Order should be overruled and Tennessee consumers should be permitted to present testimony regarding the contracts involved in BellSouth's purchase of accounts.

The Decision in Favor of BellSouth Without an Evidentiary Hearing Denied the Right of Tennessee Consumers to Call AT&T and Other Telecommunications Service Providers Who Submitted Tariffs Purporting to Bind Tennessee Consumers to BellSouth and Question Them about Their Source of Authorization and BellSouth's Influence Regarding Their Tariffs.

The decision in favor of BellSouth without an evidentiary hearing denied the right of Tennessee consumers to call AT&T and other telecommunications service providers who submitted tariffs purporting to bind Tennessee consumers to BellSouth and to question them about their source of authorization and BellSouth regarding BellSouth's influence regarding their tariffs.

Tenn. Code Ann. § 4-5-312 (b) provides in pertinent part:

(b) To the extent necessary for full disclosure of all relevant facts and issues, the administrative judge or hearing officer **shall afford** to all parties **the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence...**

AT&T and at least one other company have submitted tariffs which appear to be an attempt to assert that Tennessee consumers have given them authorization to bind those consumers to BellSouth for liabilities arising out of those companies contracts with BellSouth. Those contracts or obligations may arise from BellSouth's Billing and Collections Tariff or BellSouth's purchase of accounts. Regardless of the source, evidence regarding the obligations of Tennessee consumers to BellSouth arising from any of the companies agreements are relevant and material to this case. The decision in favor of BellSouth without an evidentiary hearing,

however, prevents Tennessee consumers from having the evidentiary hearing or calling the companies as witnesses. As a result, Tennessee consumers are denied due process.

Due Process is denied when Tennessee consumers are not permitted a hearing on the Protective Order when that Protective Order prevents Tennessee consumers from utilizing the special contracts regarding BellSouth's purchase of accounts, whether the purchase of accounts is in conformance with law, whether the accounts make Tennessee consumers independently liable to BellSouth, and whether the purchase documents themselves make Tennessee consumers independently liable and whether Tennessee consumers delegated telecommunications service providers the right to bind them to BellSouth for anything other than the receipt of payments.

The Majority's Procedure in this Case Is Another Instance of Due Process Violations.

The dissent in this case rightly cites *Tennessee Consumer Advocate v. Tennessee Regulatory Authority*, Appeal No. 01A01-9606-BC-00286, filed ____, 1997 (Tenn. Ct. App.) for the proposition that the agency is required to provide adequate notice and **full opportunity to interrogate, cross-examine and impeach** any facts, witnesses or proposed evidenced. In that case the Court reversed and vacated the agency order when the agency failed to provide full opportunity to interrogate, cross-examine and impeach when the agency sought to rely upon certain facts and documents. As that Court stated, these due process opportunities are "basic rules of fairness." In this case, the majority magnifies its error by failing to permit the presentation of evidence in addition to denying a full opportunity to full opportunity to interrogate, cross-examine and impeach.

BellSouth Has Not Presented a Theory of the Case Which Results in a Finding That the Proposed Late Payment Charge Is Lawful.

The only argument BellSouth makes is that other non-price regulation companies have late payment charges. These arguments are neither relevant nor material to whether BellSouth should be permitted to institute its proposed tariff. Tennessee consumers do not deny that other companies have late payment charges. Our argument is that this particular tariff of BellSouth is unlawful in that it violates the statute and that if it the tariff defines a service that service should be articulated and Tennessee consumers retain Tenn. Code Ann. § 65-4-125 options. None of the cases involve statutes similar to those under which BellSouth operates.

Indeed, BellSouth's filings represent a constant search for a legal theory, but not evidence supporting the operation of its tariff. Each time BellSouth presents legal authority, an intelligent review of its legal authority reveals the inapplicability of that legal authority to the tariff it has presented for approval.²⁴

The company first presents the 1975, pre-price regulation rate of return case of *State v. Council of City of New Orleans*, 309 So. 2d 290 (La. 1975). In *City of New Orleans*, the City Council, after "all sides had presented witnesses and evidence and cross-examined the witnesses offered by their adversaries" approved a 7.07 percent rate of return schedule of rates.²⁵ The Louisiana Attorney General filed suit objecting to the rates on the ground that they are discriminatory, unjust and confiscatory on the ground that the late payment imposes a penalty.²⁶ The Louisiana Supreme Court defined the precise question as whether the late payment charge

²⁴For example, its latest theory, regarding the late charge language of its private line tariff, shows markedly different language from the tariff the company proposes in this instance for similar situations.

²⁵*City of New Orleans* at 293. The agency has not permitted complete discovery or witnesses in this proceeding.

²⁶*Id.* at 294.

*comports with the standard of reasonableness required of classifications drawn among utility customers by a rate structure.*²⁷ In Tennessee, there is no dispute with respect to BellSouth that the General Assembly has prescribed the standard of justness and reasonableness with respect to it as a price regulated company. That standard required BellSouth and this agency to formally certify that rates and in particular, basic local exchange telephone services rates were just, reasonable and affordable. The TRA and BellSouth made that certification, over the objections of Tennessee consumers, and is estopped from alleging any unjustness or unreasonableness in basic local exchange telephone services rates. Indeed, BellSouth has not alleged discrimination in its pleadings.

That standard also prohibited any increase in basic local exchange telephone services rates as defined by Tenn. Code Ann. § 65-5-208 (a) (1). See, 1995 Tennessee Public Acts, chapter 408 as codified by Tenn. Code Ann. § 65-5-209 and Tenn. Code Ann. § 65-5-209 (f). BellSouth and the TRA are estopped, by the doctrine of *Inclusio unius est exclusio alterius* from alleging that Tennessee consumers basic local exchange telephone services rates can be increased for any reason other than universal service rate rebalancing. As a result, none of the factual or legal predicates for imposing the charge on basic local exchange telephone services rates exist in Tennessee.

BellSouth Has Not Proved the Essential Elements Necessary to the Approval of its Late Payment Tariff.

BellSouth has neither articulated, nor proved the essential elements necessary for approval of its proposed late charges Tariff. In order to prove that BellSouth's proposed tariff is

²⁷Id. at 294.

a nonbasic service, BellSouth must first prove that its proposed charge is not a charge associated with basic local exchange telephone services. It has not submitted any evidence of such a service, in fact BellSouth does not believe its tariff is a service at all. It is simply a charge.

The requirement that BellSouth prove that its tariff is not an basic local exchange telephone service is necessary because nonbasic services are an end product. See, Tenn. Code Ann. § 65-5-208 (a) (1) and Tenn. Code Ann. § 65-5-208 (a) (2). All services must first be tested to determine whether they are associated with basic local exchange telephone services. If they are not basic local exchange telephone services, then and only then are they nonbasic services.

BellSouth Has Neither Articulated, Nor Proved the Essential Elements which show that its Hunting Charges Tariff Should Not Be Exempt under Tenn. Code Ann. § 65-5-208 (c).

Even if the service is a nonbasic service such as hunting charges, BellSouth, when it alleges that it is reducing rates due to competition, must also prove that the service should not in any event be exempt from the provisions of chapter 5. If the service is exempt from chapter 5, it cannot be used as an offset to nonbasic rate increases. BellSouth has neither articulated, nor proved the essential elements necessary to show that its hunting charges tariff should not be exempt or that no reduction in other non-basic rates is required because the rates for hunting charges are not regulated by competition.

The Uniform Commercial Code (UCC) Is Applicable to the Purchase of Accounts for Services.

BellSouth argues that the UCC does not apply to services. While this position is correct, it is misleading. Tennessee consumers do not apply the UCC to services, Tennessee consumers apply the UCC to purchases of accounts. The UCC clearly and expressly applies to purchases of accounts for services.

BellSouth purchases the accounts of telecommunications service providers directly from the telecommunications service provider or indirectly from billing aggregators who have previously purchased the accounts of telecommunications service providers. Instead of notifying Tennessee consumers on their bills that the company has purchased the accounts, BellSouth deceptively leads consumers to believe that these telecommunications service providers are billing the consumer.

In this instance, BellSouth alleges that it seeks to independently bill and collect charges from Tennessee consumers through its proposed tariff despite the fact that these charges are not part of the service contract it purchases and despite the fact that Tennessee consumers do not directly contract with BellSouth for these service. Its proposed tariff unlawfully violates the UCC and Federal Trade Commission rule 16 C.F.R § 433.2 and fails to preserve all defenses consumers are permitted to exercise by law, including but not limited to any billing or collecting which does not arise by virtue of the consumers authorization under the account purchased.

Tennessee consumers are account debtors for purchases of accounts. BellSouth is the assignee. Tenn. Code Ann. § 47-9-318 provides in pertinent part:

47-9-318. Defenses against assignee - Modification of contract after notification of assignment - Term prohibiting assignment ineffective - Identification and proof of assignment.

(1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in § 47-9-206 the rights of an assignee are subject to:

- (a) all the terms of the contract between the account debtor and assignor *and any defense or claim arising therefrom*²⁸; and
- (b) *any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives*

²⁸Tennessee consumers can defend regarding the capacity of the assignor to create a contract making them liable to a third party or the lack of authorization, for example. See, e.g. Tenn. Code Ann. § 47-1-103.

*notification of the assignment.*²⁹

(2) So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance; and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

(3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

This section of the statute is intended only to permit an account debtor to assert against an assignee the same defensive claims it could assert against the assignor. *Patton v. McHone*, 822 S.W.2d 608, 618 (Tenn. Ct. App. 1991). BellSouth proposed late payment tariff destroys the right of an account debtor to assert the same defensive claims it might have against an assignor regarding late payment charges and is therefore unlawful.

In addition, BellSouth's purchase of accounts process and the proposed late payment tariff violate Federal Trade Commission rule 16 C.F.R § 433.2. This rule provides in pertinent part:

433.2 Preservation of consumers' claims and defenses, unfair or deceptive acts or practices.

In connection with any sale or lease of goods or services to consumers, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of Section 5 of that Act for a seller, directly or indirectly, to:

(a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:

NOTICE

²⁹In BellSouth's purchases of accounts, the account debtors never receive notice of the assignment.

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

As a result, Tennessee consumers would not have notice that they can assert all defenses against a holder (BellSouth) that they could assert against a seller of services.

Tennessee Consumers Should Be Able to Assert Defenses of Tenn. Code Ann. § 65-4-125 Lack of Capacity and Authorization Against BellSouth If the Company Independently Imposes or Seeks to Impose Charges for Service Which Are Not Part of the Account Consumers Had with the Seller of the Account.

The Hearing Officer found that BellSouth's tariff created a telecommunications service and the TRA decided that the tariff created a nonbasic service. If such a service is created, Tennessee consumers should be able to assert defenses of lack of capacity and lack of authorization against BellSouth in accordance with Tenn. Code Ann. § 65-4-125, if the company independently imposes or seeks to impose charges for a service which are not part of the account consumers had with the seller of the account.

Tenn. Code Ann. § 65-4-125 (b) provides that it is unlawful for any telecommunications service provider or agent of a provider to bill or collect charges from a consumer for any service the consumer did not authorize or order. As a result BellSouth cannot simply create self-authorizing service tariffs. Furthermore, neither BellSouth, the TRA, nor any service provider or agent has the capacity to bind Tennessee consumers unless consumers expressly authorize the service.

If BellSouth's proposed charges in the tariff become an integral part of basic local exchange telephone services rates through its GSST, the tariff will violate Tenn. Code Ann. § 65-

5-209 (f) precisely as the Hearing Officer found. The violation occurs because the rates in existence on June 6, 1995 already included all possible charges in basic local exchange telephone service rates and the new charge increases the rates prior to the expiration of the four year period.³⁰ Moreover, BellSouth is estopped from increasing the rates because it knew that basic local exchange telephone services rates would be prohibited from increase for four (4) years and has accepted the benefits provided by the statute, and res judicata applies.

Tennessee Consumers Should Have a Full Opportunity to Prove That BellSouth's Tariff Unlawfully Denies Them Defenses They Would Otherwise Have to Extortion from Purchasers of Accounts.

Tenn. Code Ann. § 65-4-122 (b) makes extortion by utilities unlawful. If BellSouth's tariff fails to truly provide a service or is unauthorized by Tennessee consumers the company commits extortion which is prohibited by law. In this case, the proposed service for which Tennessee consumers pay is the privilege of paying late. Therefore, if Tennessee consumers authorize the service they can merely pay the late payment charge without paying the bill itself for an indefinite provision of services. If this is not the service provided BellSouth's service tariff is fraudulent, because there is no consideration, and the result is unlawful extortion. Similarly, any determination that the proposed tariff provides a service must define a true, legitimate service which a Tennessee consumers authorizes and orders.

Similarly, any service tariff of other telecommunications service providers must actually provide a service as consideration for a charge. Tennessee consumers should have a full opportunity to prove that BellSouth's tariff unlawfully denies them defenses they would otherwise have to extortion from purchasers of accounts.

³⁰Under Tenn. Code Ann. § 65-5-208 (a) (1) rates and charges are synonymous.

Tennessee Consumers Should Have a Full Opportunity to Prove That Tennessee Consumers Have Not Given BellSouth Any Capacity or Authorization to Independently Bill Them for Expenses the Company Incurs Through its Purchase of Accounts of Other Telecommunications Service Providers.

Tennessee consumers should have a full opportunity to prove that Tennessee consumers have not given BellSouth any capacity or authorization to independently bill them for expenses the company incurs through its purchase of accounts of other telecommunications service providers.

Tennessee Consumers Should Have a Full Opportunity to Prove That Tenn. Code Ann. § 65-4-125 Defenses Are Applicable to Both the Ordering of Any Alleged Non-basic Service and to BellSouth's Purchase of Accounts and That Tennessee Consumers Have Not Given BellSouth Any Capacity or Authorization to Independently Bill Them for Expenses the Company Incurs Through its Purchase of Accounts of Other Telecommunications Service Providers.

Tennessee consumers should have a full opportunity to prove that Tenn. Code Ann. § 65-4-125 defenses are applicable to both the ordering of any alleged non-basic service and to BellSouth's purchase of accounts and that Tennessee consumers have not given BellSouth any capacity or authorization to independently bill them for expenses the company incurs through its purchase of accounts of other telecommunications service providers.

The Agency Has Not Entered a Written Order Granting the Petition for Rehearing or Reconsideration.

The agency has not entered a written order within either 20 days as required by Tenn. Code Ann. § 4-5-317 or 30 days as required by Tenn. Code Ann. § 65-2-118 and the Petition for Reconsideration may be deemed denied from a statutory standpoint. The agency did not enter an order disposing of the Petition for Reconsideration in the allotted time. *Therefore, Tennessee consumers petition is deemed denied.* Furthermore, the agency has not entered an order

disposing of the petition as of the filing of this brief. Under the law Tennessee consumers
Petition for Reconsideration is clearly deemed denied as a matter of law and Tennessee
consumers may be required to proceed on that basis.

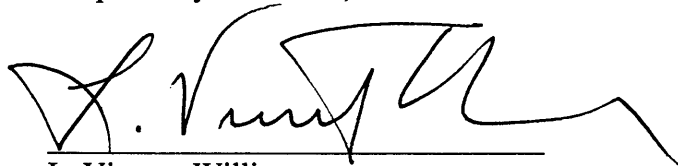
A Continuance Should Be Granted to Permit Oral Argument.

As this document shows, the issues in this case are numerous and complex. And many are
of first impression, discovery has not been completed and Tennessee consumers do not have a
ruling on the modification of the protective order and have not been given full opportunity to
cross-examine, rebut and contest in this case. Furthermore, BellSouth's actions and non actions
have caused the problems in this case.

Moreover, counsel for Tennessee consumers is serving Jury Duty and no other member of
his office can be prepared to argue the issues on the date currently scheduled.

Tennessee consumers pray that the motions and objections of BellSouth be overruled and
that a continuance be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "L. Vincent Williams", written over a horizontal line.

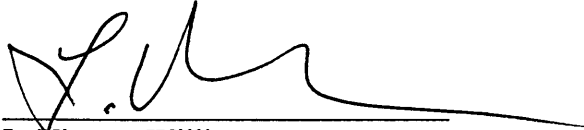
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Document has been faxed and mailed postage prepaid to the parties listed below this 25th day of September, 2000.

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